

14 October 2005

**CRIMINAL PROCEDURE RULE COMMITTEE
CONSULTATION ON PROPOSED RULES ABOUT EXPERT EVIDENCE**

The Criminal Procedure Rule Committee is considering a proposal for rules to govern the procedure for introducing expert witness evidence in criminal proceedings. Members of the Committee would very much appreciate your views. The proposed rules are modelled on the well-established Part 35 of the Civil Procedure Rules but with changes intended to reflect the different features and requirements of criminal proceedings.

I enclose a copy of the draft proposed rules, with an explanatory note and with a list of those to whom this letter has been sent.

The Committee is the body appointed under section 70 of the Courts Act 2003 to make rules governing the practice and procedure to be followed in the criminal courts. The first rules to be made by the Committee, the Criminal Procedure Rules 2005, came into force on 4th April. Information about the Committee and about the Criminal Procedure Rules, including the full text of the Rules, may be found on the website of the Department for Constitutional Affairs.

I should be grateful if you would note these important points about this consultation:

- a) the Department for Constitutional Affairs provides the Committee with its secretariat but the proposal that is the subject of this consultation is not a government proposal, it is a Committee initiative (and one on which the Department itself will be invited to comment);
- b) the Committee hopes to consider the proposal again at a meeting on 15th December, 2005. For that reason **it would be very helpful to have any comments you wish to make by 7th December** in order that they may be circulated to members. Please address any comments to me. **If you wish to**

comment on the draft rules but you do not expect to be able to do so by that date, please let me know how much extra time you require. It is very likely that the Committee will postpone their final decision on the proposal until all expected comments have been received, unless that would mean a lengthy postponement.

If it would help you to receive by email an electronic copy of this letter and the enclosures, please let me know. My email address is given above.

If the list of those consulted omits any you know to have an interest in the proposal then I should be grateful if you would let me know. You are welcome to pass a copy of this letter to any others who you think may wish to comment.

May I extend to you members' thanks for your consideration of this proposal.

Yours sincerely,

Jonathan Solly

CRIMINAL PROCEDURE RULE COMMITTEE

A proposal for Criminal Procedure Rules about expert evidence

Introduction

1. The Criminal Procedure Rules already contain, in Part 24, rules about the disclosure of expert evidence and, in Part 27, general rules about witness statements. Part 1 of the Rules sets out their overriding objective and requires all ‘participants’ (not only the parties) to act in accordance with that objective. Part 3 of the Rules gives the court wide general powers of case management, and the case progression forms prescribed by the Consolidated Criminal Practice Direction for use in connection with those rules refer to the giving of directions about the introduction and management of expert evidence.

2. However, unlike the Civil Procedure Rules the Criminal Procedure Rules as yet contain nothing explicit about how the overriding objective applies to an expert witness, or about the form in which expert evidence should be introduced, or about the use of the court’s case management powers to define what is in dispute between experts. When the first Criminal Procedure Rules were made it was expected that explicit provisions would be introduced at some stage and the Rules were arranged accordingly, setting aside Part 33 for those provisions.

3. The draft rules proposed are consciously modelled on Part 35 of the Civil Procedure Rules. The Criminal Procedure Rule Committee sees an advantage in aligning the two sets of rules as closely with each other as possible while allowing for the substantial differences between civil and criminal proceedings. In particular, it helps to remove unnecessary procedural confusion for those who give expert evidence in both jurisdictions.

4. Committee members believe the proposed draft rules to be consistent with recommendations made in a series of past reviews of aspects of expert witness evidence, notably those of the Royal Commission on Criminal Justice in 1993, those of Lord Justice Auld’s *Review of the Criminal Courts of England and Wales* published in October, 2001, those of the report entitled ‘Sudden unexpected death in infancy’ published in September, 2004 by a Royal Colleges’ working group chaired by Baroness Helena Kennedy, and those of the House of Commons Science and Technology Select Committee’s report entitled ‘Forensic Science on Trial’ published in March, 2005. Notwithstanding that, the Committee recognises that the proposals are controversial in some respects. As drafted, they require a degree of co-operation that some may think inappropriate in adversarial proceedings. The power to direct the appointment of a single joint expert may be thought especially contentious, even if that power were likely to be used infrequently. In the Committee’s judgement what is proposed is within its powers and compatible with the overriding objective of the Rules, including the right to a fair trial. But members are keen to have others’ views.

Notes on the draft rules

5. The essential distinction between expert and other evidence in criminal proceedings is whether the witness deals with matters that go beyond common knowledge and experience. The draft rules do not purport to define the circumstances in which evidence should be treated as expert evidence, or the significance that should be attached to such evidence. The Criminal Procedure Rules govern the practice and procedure of the criminal courts: see section 69, Courts Act 2003. What constitutes expert evidence remains a matter of common law.

6. Expert evidence may be relevant to sentence as well as to issues that arise at trial. The Committee intends the proposed draft rules to apply to both.

The expert's duty to the court

7. Rule 35.3 of the Civil Procedure Rules declares that it is the expert's duty to assist the court above any obligation that he has to those instructing him. Although expert witnesses, in common with all other participants in a criminal case, are required to act in accordance with the overriding objective of the Criminal Procedure Rules – see CrimPR 1.2 – the Rules at present are silent on the application of that duty to experts.

8. On one view, rule 1.2 plainly applies to expert witnesses as it applies to all other participants and the explicit application of that rule to experts would be superfluous. On another view, the position of expert witnesses is sufficiently different, or at least is so perceived, as to justify an explicit articulation of that duty as it applies to them.

Form and content of an expert's report

9. Rules 35.5(1) and 35.10 of the Civil Procedure Rules, and the associated provisions of the relevant practice direction, deal with the form and content of experts' reports. These proposed draft rules are substantially the same as those. The Criminal Procedure Rule Committee saw a particular advantage for expert witnesses who give evidence (sometimes substantially the same evidence) in civil and in criminal proceedings in the alignment of these requirements. Moreover, these requirements for the content of an expert's report substantially correspond with what has been recommended for criminal proceedings in the past.

10. The draft rules provide for an exception where a summary of an expert's conclusions is served. Where expert evidence is relied upon but no full report is available, to speed the disclosure of the prosecution case the Crown Prosecution Service may be able to provide a summary of the expert's conclusions. The Committee welcomes that practice and does not wish to inhibit it by this rule. Where there is no dispute about those conclusions then they may be admitted and there will be no need for a full report. In other circumstances, however, the requirements of the draft rule would apply. The rule and the exception would apply equally to expert evidence introduced by a defendant.

Pre-hearing consideration of expert evidence and discussion between experts

11. On one view, the powers of case management in Part 3 of the Criminal Procedure Rules, supplemented by the directions contained in the prescribed case progression forms, give courts all they need to achieve an effective pre-hearing identification of expert evidence issues, as they do all other issues that may arise. That was assumed by

the Court of Appeal in the concluding paragraphs of the judgment on 22nd July, 2005, in *R v Harris and others* [2005] EWCA Crim 1980. On another view, the position of expert witnesses is sufficiently different, or at least is so perceived, as to justify the making of rules explicitly governing some aspects of pre-hearing preparation in an expert witness case.

12. The Committee recognises that there are divergent views on the usefulness, cost-effectiveness and even legality of requiring the parties to co-operate in the definition of what is in dispute between experts, and in particular on the proposal that experts be required to discuss the issues amongst themselves. However, it is not immediately obvious why a discussion between expert witnesses of their respective conclusions, as recorded in their reports, necessarily would breach any confidentiality those witnesses may owe to their respective clients, or would be in any respect unfair. By that time the expert's opinions will have been disclosed. It reasonably may be assumed that no reputable expert witness will advance a different opinion in private to that contained in the report. Naturally expert witnesses must be paid for the time taken up by a discussion. However, unless experts are opposed on every issue that may be relevant to the trial, then it is not immediately obvious why a pre-trial discussion of some sort that defines what is in dispute should not often save time – including the time of the expert witnesses themselves – at trial. The report earlier this year of the House of Commons Science and Technology Select Committee concluded that pre-hearing discussion between experts clearly is in the interests of justice.

13. Draft rule 33.4 is intended to make it clear that, whether or not there should also be a discussion between experts, the court may require the parties to define what remains in dispute after each has seen the other's expert report. It may be that this draft rule, in particular, is unnecessary in view of the general powers of case management in Part 3.

14. Draft rule 33.5 provides for the court to direct a discussion, not necessarily a meeting. The Committee recognises that to require experts to meet may well be impractical. The rule accommodates the possibility of a discussion taking place by telephone or other electronic means.

Sanction for failing to comply with directions

15. Draft rule 33.6 reproduces the sanction in rule 24.3 for failure to disclose expert evidence. It does not specify criteria for the grant or withholding of permission because its application is subject to the overriding objective (as is the interpretation and application of all the rules).

Single joint expert

16. These provisions follow closely the equivalent rules in Part 35 of the Civil Procedure Rules. The Committee recognises that they are likely to be the most controversial of these proposals. The intention is that the discretion to direct the appointment of a single joint expert should be exercised sparingly, and only where that expert's conclusions are not expected to be in dispute: in effect, to avoid a proliferation of reports that reach substantially the same conclusion. If in the event those conclusions were disputed then the court could be expected to rescind the direction. The Committee recognises also that the need to use this power to appoint a

joint expert may arise infrequently. Certainly it seems unlikely (though it would not be impossible) that an expert whose evidence already was part of a party's case would be instructed as a joint expert on any further issue.

17. Comments on this proposal will be especially welcome. As presently drafted the proposed rule would apply (and it is intended to apply) to parties with opposing interests, notably the prosecution and the defence. Perhaps it should be confined to parties whose interests are not in conflict, so extending only to two or more defendants. Or perhaps the rule should apply to the prosecution as well, but only if the constraints anticipated in the preceding paragraph are written into it explicitly.

Relationship with the rules in Part 24

18. The proposal is that these rules should appear in Part 33 of the Criminal Procedure Rules, among other rules that deal with the procedure for introducing other categories of evidence. The corresponding rules in Part 35 of the Civil Procedure Rules deal, to a certain extent, with the disclosure of expert evidence: although there are other, separate, rules that also govern disclosure.

19. The rules that appear in Part 24 of the Criminal Procedure Rules deal exclusively with the disclosure of expert evidence and for that reason they were placed among other rules about advance information and disclosure. But perhaps the proposed new rules should be placed in Part 24 as well, because although they do not deal with disclosure they also deal with expert evidence. Or perhaps the rules now in Part 24 should be removed to Part 33, because although they do not deal with the procedure on the introduction of expert evidence still they do deal with expert evidence.

Questions for consideration

20. The Criminal Procedure Rule Committee invites those consulted to comment on any aspect of this proposal. It appears to raise the following questions in particular:

Are any of these additional rules required, or are the existing rules sufficient ?

Is the expert's duty to the court appropriate ?

Are the requirements for the content of an expert's report appropriate ?

Is draft rule 33.4(2) necessary ?

Is it possible to require a discussion between experts ? If so, is that appropriate ?

Is there any place in criminal proceedings for a power to require the appointment of a single joint expert ? If so, is draft rule 33.7 adequate or should it be restricted in some way ?

Should these additional rules be joined with the rules in Part 24, or should those rules be joined with these in Part 33 ?

List of those consulted

The Department for Constitutional Affairs
The Home Office
HM Attorney General
The Office for Criminal Justice Reform
The Crown Prosecution Service
The Serious Fraud Office
HM Revenue and Customs Prosecutions Office
The Whitehall Prosecutors Group
The Senior Presiding Judge
The Council of Circuit Judges
The Senior District Judge (Chief Magistrate)
The Magistrates' Association
The Justices' Clerks' Society
The Bar Council
The Law Society
The Institute of Legal Executives
The Criminal Cases Review Commission
The Law Commission
The Legal Services Commission
The Council for the Registration of Forensic Practitioners
The General Medical Council
The British Medical Association
The Academy of Medical Royal Colleges
The British Psychological Society
The Institute of Chartered Accountants
The Royal Institute of Chartered Surveyors
The Health and Safety Executive
The Local Government Association
The Criminal Bar Association
Solicitors in Local Government
The Academy of Experts
The Expert Witness Institute
The Association of Chief Police Officers
Professor I. R. Dennis
Professor J. R. Spencer
Professor A. T. H. Smith
Philip Plowden, Esq.
The Editor, Archbold Criminal Pleading, Evidence and Practice
The Editor in Chief, Blackstone's Criminal Practice
The Editors, Stone's Justices' Manual
The Editor, Magistrates' Courts Criminal Practice

draft / Criminal Procedure Rules

EXPERT EVIDENCE

Part 33

Expert evidence

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Expert's duty to the court	rule 33.2
Form and content of expert's report	rule 33.3
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Court's power to direct that evidence is to be given by a single joint expert	rule 33.7
Instructions to a single joint expert	rule 33.8

Reference to expert

33.1 A reference to an 'expert' in this Part is a reference to a person who is required to give or prepare evidence for the purpose of criminal proceedings.

Expert's duty to the court

33.2 An expert must help the court to achieve the overriding objective by giving objective, unbiased opinion on matters within his expertise.

Form and content of expert's report

33.3 (1) An expert's report must follow the form prescribed by the Practice Direction.

(2) An expert's report must -

- (a) give details of the expert's qualifications and relevant experience;
- (b) give details of any literature or other material which the expert has relied on in making the report;
- (c) contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;
- (d) make clear which of the facts stated in the report are within the expert's own knowledge;
- (e) say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the

qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision;

(f) where there is a range of opinion on the matters dealt with in the report:

(i) summarise the range of opinion, and

(ii) give reasons for his own opinion;

(g) contain a summary of the conclusions reached;

(h) if the expert is not able to give his opinion without qualification, state the qualification;

(i) contain a statement that the expert understands his duty to the court, and has complied and will continue to comply with that duty;

(j) contain the same declaration of truth as a witness statement.

(3) This rule does not apply to a summary of an expert's conclusions served in advance of that expert's report.

[Note. Part 24 contains rules about the disclosure of expert evidence. Part 27 contains rules about witness statements. Declarations of truth in witness statements are required by section 9, Criminal Justice Act 1967 and section 5B, Magistrates' Courts Act 1980. A party who accepts another party's expert's conclusions may admit them as facts under section 10, Criminal Justice Act 1967.]

Pre-hearing consideration of expert evidence

33.4 (1) This rule and rule 33.5 apply where more than one party wishes to introduce expert evidence.

(2) The court may direct those parties to give notice to each other and to the court officer of –

(a) the matters on which the experts agree and disagree; and

(b) where they disagree, the reasons for that disagreement.

Pre-hearing discussion

33.5 (1) The court may direct the experts to -

(a) discuss the expert issues in the proceedings; and

(b) prepare a statement for the court of the matters on which they agree and disagree, giving their reasons.

(2) Except for that statement the content of that discussion must not be referred to at a hearing unless the parties agree.

Failure to comply with directions

33.6 A party who wishes to introduce expert evidence and who fails to comply with a direction under rule 33.4 or rule 33.5 may not introduce that evidence without the court's permission.

[Note. At a pre-trial hearing a court may make binding rulings about the admissibility of evidence and about questions of law under section 7, Criminal Justice Act 1987; sections 31 and 40, Criminal Procedure and Investigations Act 1996; and section 45, Courts Act 2003.]

Court's power to direct that evidence is to be given by a single joint expert

33.7 (1) Where more than one party wishes to introduce expert evidence on an issue, the court may direct that the evidence on that issue is to be given by one expert only.

- (2) Where those parties cannot agree who should be the expert, the court may –
- (a) select the expert from a list prepared or identified by them; or
 - (b) direct that the expert be selected in such other manner as the court may direct.

Instructions to a single joint expert

33.8 (1) Where the court gives a direction under rule 33.7 for a single joint expert to be used, each of those parties may give instructions to the expert.

(2) When a party gives instructions to the expert he must, at the same time, send a copy of the instructions to the other instructing parties.

(3) The court may give directions about –

- (a) the payment of the expert's fees and expenses; and
- (b) any inspection, examination or experiments which the expert wishes to carry out.

(4) The court may, before an expert is instructed, limit the amount that can be paid by way of fees and expenses to the expert.

(5) Unless the court otherwise directs, the instructing parties are jointly and severally liable for the payment of the expert's fees and expenses.